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**IN THE
COURT OF APPEALS OF INDIANA**

MERIDIAN INSURANCE, A DIVISION OF
STATE AUTOMOBILE MUTUAL
INSURANCE COMPANY,

Appellant-Plaintiff,

VS.

CHA CHA, INC.

Appellee-Defendant.

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No. 53A01-0608-CV-352

APPEAL FROM THE MONROE CIRCUIT COURT

The Honorable Stephen R. Galvin, Judge

Cause No. 53C06-0304-PL-635

June 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

In this interlocutory appeal, Meridian Insurance (“Meridian”) appeals the trial court’s partial final judgment in favor of Cha Cha, Inc. (“Cha Cha”) in the amount of \$188,492.33 for business interruption losses. Meridian raises the following restated issue:

- I. Whether the trial court erred in ordering it to pay Cha Cha the \$188,492.22, in addition to the sums previously paid.

Cha Cha raises the following restated issue on cross-appeal:

- II. Whether it is entitled to damages, including attorney fees, pursuant to Indiana Appellate Rule 66(E).

We affirm.

FACTS AND PROCEDURAL HISTORY¹

On February 9, 2002, a Cha Cha retail clothing store in Bloomington suffered smoke and water damage when a fire occurred in an adjacent building. Cha Cha filed a claim with its insurer, Meridian. Meridian eventually paid Cha Cha approximately \$175,000.00, which included \$42,276.90 for business interruption losses covering a three-month period from the date of the fire through May 22, 2002. Cha Cha, which did not resume business operations at the Bloomington store for more than twelve months after the fire, pursued a claim with Meridian for additional damages, including additional business interruption losses. When Meridian refused to pay any additional damages, Cha Cha invoked an appraisal pursuant to the terms of the insurance policy.

In January 2003, Meridian filed a complaint for declaratory judgment seeking a determination as to the rights and obligations of the parties. In its complaint, Meridian alleged that Cha Cha had improperly invoked the policy’s appraisal process. Cha Cha filed a

counterclaim alleging breach of contract, negligence, and breach of the duty of good faith. In January 2004, Cha Cha filed a motion for an appraisal pursuant to the terms of the insurance contract. Meridian agreed to the appraisal process with respect to the amount of business income, but not to the period of restoration.

The contract defines the relevant terms as follows:

“Business Income” means the:

- (a) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred if no physical loss or damage had occurred.

Appellant’s App. at 10.

“Period of Restoration” means the period of time that:

- (a) Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and
- (b) Ends on the earlier of:
 - (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
 - (2) The date when business is resumed at a new permanent location.

Id. at 8.

The parties each selected an appraiser, and the court appointed an umpire. In February 2004, before the appraisal process began, Meridian sent the following letter to its selected appraiser, Michael Harding:

The insured has been paid for payroll business interruption loss through approximately the middle of May, 2002, which is approximately three (3)

¹ Oral argument was heard on this case on May 21, 2007 in Indianapolis.

months following the fire in this case. The only remaining issue is what amount of business interruption losses, e.g. loss of income or net profits, the insured may be entitled to. Please note that the policy provides business interruption loss for up to twelve (12) months.

Because the only issue for this appraisal is what is the amount of lost income or net profits, you are to determine that amount, in any manner you deem appropriate or reasonable, consistent with your knowledge, experience, training, background, and expertise. That may result in a specific breakdown of losses per month, per season, or another similar business cycle. You are not to determine the total amount of any coverage that may be available under the insurance policy for the remainder of any business interruption loss. In other words, you, the other appraiser, and/or the umpire are not to determine what was a reasonable length of time within which the insured should have had its business operating again after the fire. That issue is being considered by the Court.

Id. at 138.

During the appraisal process, the appraisers met and conferred with each other and with the umpire. The umpire and Cha Cha's appraiser eventually signed an Appraisal Agreement ("Agreement"). Meridian's appraiser did not agree with the appraisal and refused to sign the Agreement.

In September 2004, the umpire sent the Agreement to the parties. A cover letter to the Agreement provided as follows:

Enclosed please find the Appraisal Agreement executed by myself and Joe Hoffman. Michael Harding has declined the opportunity to join in this decision. The loss was calculated for the full thirteen month period, per your instructions. The actual period of compensable loss is not determined by the enclosed agreement.

Id. at 128.

The Agreement provides in relevant part as follows:

We the undersigned, pursuant to the Appraisal provision of the policy of insurance between the defendant and the plaintiff, do hereby certify that we have truly and conscientiously performed the duties assigned to us, and have appraised and determined the Business Income/Extra Expenses loss as follows:

Amount of Loss	\$250,000
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The amount of loss is calculated for a period of 13 months following the direct physical loss.

This loss has been calculated without reduction for Business Income/Extra Expense payments advanced to the insured.

Id. at 141.

In October 2004, Meridian filed a motion to clarify the appraisal report, and Cha Cha responded with a motion to enter judgment on the appraisal. In June 2005, the trial court entered an order that provides in pertinent part as follows:

15. Pursuant to the parties' contract and specifically in response to the plaintiff's above referenced prayer for a ruling regarding the period of restoration, the court finds the period of restoration in the case at bar to be twelve (12) months;
16. On September 24, 2004, pursuant to the terms of the parties' contract and pursuant to this court's order dated March 19, 2004 issued without objection by either party, Umpire Patrick S. McSoley determined the amount of the loss herein to be \$250,000 for thirteen (13) months without reduction for sums previously advanced by the plaintiff to the defendant for business interruption losses or net profits;
17. Pursuant to the parties' contract and specifically in response to the plaintiff's prayer, the court finds that the business loss in the case at bar to be \$19,230.77 per month;
18. The court finds that the plaintiff is entitled to a credit of \$42,276.90 for sums previously advanced to the defendant for business losses;
19. The court finds the defendant is entitled to a judgment against the plaintiff for the sum of \$188,492.33.

Id. at 218-19.

Thereafter, Meridian filed a motion to reconsider, which the trial court denied. In July 2006, the trial court ordered that its June 2005 order was a partial final judgment under Indiana Trial Rules 54(B) and 58, and could therefore be appealed. Meridian now appeals the June 2005 order.

DISCUSSION AND DECISION

I. Trial Court's Order

Meridian contends that the trial court erred in ordering it to pay Cha Cha the additional \$188,492.33 for business interruption losses. Specifically, Meridian contends that the trial court erred in allowing the appraisal process to determine the period of restoration. According to Meridian, the determination of the restoration process is a question of law to be determined by the trial court.

Cha Cha responds that, in fact, the trial court did determine the period of restoration. In support of its response, Cha Cha points out that Meridian specifically instructed its appraiser not to determine the period of restoration. Rather, Meridian instructed its appraiser to determine in any manner deemed appropriate or reasonable the amount of Cha Cha's lost income. The appraiser was told that the determination might result in a specific breakdown of losses per month, per season, or per business cycle.

In addition, the cover letter to the Agreement specifically states "the actual period of compensable loss is not determined by the enclosed agreement." *Appellant's App.* at 128. Further, the appraisal itself found a \$250,000 business interruption loss for the thirteen

months that the business was closed following the fire, resulting in a per month breakdown of losses of \$19,230.77.

The trial court adopted the appraisal's \$250,000 business interruption loss, including the \$19,230.77 monthly loss. The court then determined that the period of restoration, or the reasonable length of time that Cha Cha should have had its business operating again was twelve months, the maximum allowed by the insurance contract. The court multiplied the \$19,230.77 by the twelve months, subtracted the \$42,276.90 already paid to Cha Cha, and ordered Meridian to pay Cha Cha an additional \$188,492.22. Thus, according to Cha Cha, the only item that the trial court adopted from the appraisal was the \$250,000.00 total business interruption loss, which Meridian does not challenge. Our review of the trial court's order reveals that Cha Cha is correct, and we find no error.²

II. Indiana Appellate Rule 66(E) Damages

On cross-appeal, Cha Cha asks this court to award it damages pursuant to Ind. Appellate Rule 66(E), which allows for the assessment of damages if an appeal, petition, motion, or response is frivolous or in bad faith. *Retseck v. Fowler State Bank*, 782 N.E.2d 1022, 1027 (Ind. Ct. App. 2003). The assessment of damages is discretionary and may include attorney fees. *Id.* Appellate damages for lack of merit should be applied only when the appellant's contentions and arguments are utterly devoid of all plausibility. *Id.*

² Because our resolution of this issue is dispositive, we need not address Meridian's argument that the appraisal award was unjust and incomplete.

Here, after reviewing Meridian's appellate brief and considering its oral argument, we conclude that its contentions were not utterly devoid of all plausibility. We therefore decline to award Cha Cha appellate damages.

Affirmed.

RILEY, J., and FRIEDLANDER, J., concur.